CENTER FOR REGULATORY REASONABLENESS

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VIA EMAIL & FIRST CLASS U.S. MAIL

Mr. E. Scott Pruitt
Administrator (Designate)
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Don Benton
Mr. Charles Munoz
Office of the Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Review of EPA's Small MS4 Stormwater General Permit for New Hampshire
Request for Immediate Action

Dear Administrator Pruitt:

The Center of Regulatory Reasonableness ("CRR") on behalf of the New Hampshire Stormwater Coalition (a group of 20 affected New Hampshire cities) requests your formal review of a host of new requirements that EPA has sought to impose arbitrarily and without authority on small Municipal Separate Storm Sewer System (MS4) dischargers in New England. The final permit action for New Hampshire was announced by EPA Region I on January 18, 2017, just two days before President Trump took office, knowing that his new Administration would never countenance the action. *Federal Register publication has yet to occur regarding the New Hampshire permit and should be prevented so that the new mandates can be rationally reconsidered in light of the actual requirements contained in the Act and the adopted NPDES rules.* The following provides some brief background on this request.

This latest federal action in New Hampshire mirrors EPA's earlier decision to issue a dramatically more restrictive small MS4 general permit to Massachusetts communities in April 2016. That general permit is presently under appeal in the D.C. Circuit Court of Appeals by a host of municipal entities (including CRR) due to the extreme costs of compliance and EPA's failure to follow its adopted rules applicable to MS4 permitting. *See, CRR, et al v. EPA* (D.C. Cir. 16-1246). Although applicable stormwater permitting rules have not changed, both of these new MS4 permits are *5 times the length* of the prior permit and are projected to impose *$5-10 billion in new compliance costs* over a 10 year period causing real economic harm to small

communities in New England.[1] Our analysis confirms that the new mandates EPA imposed suffer from an array of legal and scientific infirmities, and plainly exceed statutory authority by (a) creating new discharge prohibitions that are nowhere contained in the adopted NPDES stormwater rules or the Clean Water Act, (b) creating a presumption that the discharge causes adverse water quality impacts contrary to the express language of the Act and existing rules, (c) eliminating schedules of compliance allowable under state law and exposing cities to immediate citizen suit action, and (d) by seeking to control individual land use planning actions under the rubric of an "antidegradation" review. Taken as a whole, one would be hard pressed to fashion a more arbitrary and abusive set of federal requirements in an NPDES permit.

These new EPA mandates, which have never been subjected to the federal APA rulemaking process or notice under the Congressional Review Act, represent dramatic revisions to EPA's existing MS4 program. Beyond the numerous legal infirmities, the new permit also created a massive increase in testing and reporting, even though no federal laws had changed and no specific analyses warranted such action. To date, hundreds of millions of dollars have been spent in an effort to comply with the prior federal stormwater permit mandates. But *billions* more will be necessary to address these *ad hoc* mandates if EPA's regulatory agenda is left unchecked. Therefore, consistent with President Trump's recent action entitled "Regulatory Freeze Pending Review" we ask that this arbitrary action may be promptly stopped and reasonably reconsidered.

It is our view that the major objections to the permit can be resolved easily through an objective comparison of the new mandates to the existing rules. We would hope that the Trump Administration would not countenance EPA's costly action that so plainly violates the "rule of law" that is supposed to govern federal agency activities and the issuance of NPDES permits.

We look forward to your response in this matter.

Sincerely,

John C. Hall
Executive Director
Center for Regulatory Reasonableness

cc: Governor, Chris T. Sununu
Clark Freise, Assistant Commissioner, NHDES

[1] The enormous size of the new Region 1's MS4 permit (exceeding 250 pages with appendices) is indicative, alone, of the significant new substantive requirements contained therein. Prior EPA issued/approved general MS4 permits were typically 20-30 pages long.

Examples of Arbitrary and Abusive Provisions Contained in New Small Community MS4 Permit Nowhere Found in Adopted NPDES Rules or Statute

Provision 2.1.1(a) prohibits any discharge from "causing or contributing" to any water quality standard exceedance thereby creating immediate exposure to citizen suits and eliminating allowable schedules of compliance.

> *"The permittee shall reduce the discharge of pollutants such that discharges from the MS4 do not cause or contribute to an exceedance of water quality standards."*

Analysis: Under EPA's existing (albeit legally flawed) interpretation, the mere presence of a pollutant of concern (regardless of cause – *e.g.*, natural occurrence or degree of significance) is grounds for claiming permittee is "causing and contributing" and therefore in violation of the provision. This prohibition does not exist in the adopted NPDES rules applicable to existing dischargers, is contrary to decades of NPDES program implementation and, in any event, schedules of compliance are authorized to avoid creating non-compliance in these situations while analysis and remediation efforts are ongoing.

Provision 2.1.2(a)-(b) specifies no new development may occur that increases any pollutant loading (or flow) anywhere in the MS4 system.

> *"Any increased discharge (including increased pollutant loadings) through the MS4 to waters of the United States is subject to New Hampshire antidegradation regulations. The permittee shall comply with the provisions of N.H. Code Admin. R. Part Env-Wq 1708.04 and 1708.06 including information submittal requirements and obtaining authorization for increased discharges where appropriate."*

Analysis: EPA falsely claims that state antidegradation rule compliance applies to the review of all pollutant impacts of individual local land use planning and development decisions. It does not. This new provision also violates CWA statutory scheme that only imposes a Maximum Extent Practical ("MEP") standard on the overall MS4 community and exceeds statutory authority by seeking to regulate the every individual component of MS4 decision making. The Act does not give EPA authority to federalize local land use planning determinations via the federal antidegradation policy.

Provision 2.2.2(a)-(e) creates a presumption that more restrictive MS4 remedial measures are required if the MS4 discharges upstream of a listed impaired water and the pollutant is contained in MS4 discharge.

> *If there is a discharge from the MS4 to a water quality limited waterbody where pollutants typically found in stormwater (specifically nutrients (Total Nitrogen or Total Phosphorus), solids (Sedimentation/Siltation or Turbidity), bacteria/pathogens (Enterococcus, fecal coliform, or Escherichia Coli), chloride (Chloride), metals (Cadmium, Copper, Iron, Lead or Zinc) and oil and grease (Oil Slicks, Benzo(a) pyrene (PAHs)) are the cause of the impairment and there is not an approved TMDL, or the MS4 is located in a town listed in Part 2.2.2.a.-e. the permittee shall comply with the provisions in Appendix H applicable to it."*

Analysis: This provision is expressly contrary to adopted NPDES rule (40 C.F.R. § 122.44(d)) that mandates EPA, as the permit writer, is responsible for confirming (with evaluations/analyses) the need to

regulate a discharge more restrictively and ignores that other factors may be responsible for the impairment (*e.g.*, natural weathering (aluminum), low flow conditions or agricultural sources causing bacteria exceedance).

Provision 2.1.1(d) creates an impossibly strict compliance schedule (60 days) for addressing any newly discovered water quality standard or permit condition violation associated with the discharge:

> *"[I]f a pollutant in a discharge from the MS4 is causing or contributing to a violation of applicable water quality criteria for the receiving water, the permittee shall, as expeditiously as possible, but no later than 60 days of becoming aware of the situation, reduce or eliminate the pollutant in its discharge such that the discharge meets applicable water quality criteria."*

Analysis: This provision has no basis in federal law and improperly negates state schedule of compliance authority which is intended to avoid placing dischargers in ongoing non-compliance. Sixty days is a patently arbitrary compliance deadline that is unrealistic when addressing complex water quality impairment issues. Imposing immediate compliance responsibilities without opportunity for notice and comment regarding the nature of the new requirement violates Section 101(e) of the Act.